IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 34 OF 2004.

The Commissioner of Income Tax,
having Office at Aaayakar
Bhavan Patto, Plaza,
Panaji, Goa. .... Appellant.

Versus

M/s. Arm Engineers,
Shop No. 40, Apna Bazaar,
1st Floor, Vasco-da-Gama, Goa. .... Respondent.

Shri S. R. Rivonkar, Advocate for the Appellant.

Shri N.M. Porwal with Shri A.D. Bhobe, Advocates for the Respondent.

CORAM: B. H. MARLAPALLE &
N. A. BRITTO, JJ.

DATE: 15th December, 2004.

ORAL JUDGMENT: (PER MARLAPALLE, J.)

This is an appeal by the Revenue, being aggrieved by the Order passed by the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal, Panaji Bench, Goa and it raises the following substantial question of law for our decision and it recites the following substantial question of law for our decision :-

" Whether the lower appellate forums committed an error in law in making applicable the decision of the Supreme Court in the case of **Brij Bhushan Lal Parduman Kumar (115 ITR 524).** In the instant case wherein the

contractee is a cooperative sugar factory and not a Government Department/establishment and the clause of the contract had provided an option to the contractor/assessee to procure the material in case the contractee failed to do so and also the debit notes for an amount of Rs.1,03,61,602/- were made available. “

2. The Assessee had filed return of income on 31.12.1996 and the same was processed under Section 143(1)(a) of the Income Tax Act 1961 on 7.1.1997. On 9.1.1997 the Assessee had filed a revised return of income declaring total income of Rs.2,98,580/- as against the earlier declared income of Rs.5,28,720/-. The revised return of process was filed under Section 143(1B) on 13.2.1997. The assessment was completed on 27.3.98 determining the income of Rs.2,98,580/-. During the course of assessment proceedings for the accounting year 1998-99 the Assessing Officer noticed that there was a short account of contract receipts to the extent of Rs. 94,35,804/- and he presumed that income chargeable to tax was escaped within the meaning of S.147 of the Act. Consequently the assessment was reopened by issuing notice under S.148 of the Act.

3. After hearing the Assessee, the Assessing Officer on considering the record, passed the assessment order on 27.3.02 and held that the Understatement of Contract Receipts came to Rs.70,82,160/- and the disallowance under S.40A(3) of the Act was worked out at Rs.1,48,957/- thus making a total additional income of Rs.75,29,700/- for additional tax as well as interest, etc. This order was challenged in appeal before the Commissioner of Income Tax (Appeals) Panaji, Goa and the appeal was partly allowed inasmuch

as the Order of disallowing under S.40A(3) was confirmed while the order regarding understatement of contract receipts valued at Rs.70,82,116/- was set aside. The A.O. therefore went in further appeal before the Income Tax Appellate Tribunal, Panaji and Income Tax Appeal No.11/2003 for the assessment year 1996-97 came to be dismissed by accepting the reasoning given by the CIT (Appeals). Both the appellate authorities below referred to the decision of the Supreme Court in the case of **Brij Bhushan Lal Parduman Kumar v. CIT (115 ITR 524)** and held that that the contractee had confirmed to have purchased the construction material even to the extent of differential amount of Rs.7082,160/- and even in the absence of the debit notes, the assessing quantum of income would not be affected.

4. The Revenue does not agree with the view taken by both the appellate authorities below, mainly on the ground that the contractee in the case of Brij Bhushan (supra) was a Government establishment/department, whereas in the case at hand, the contractee was a sugar factory by name Shivajirao Patil Nilangekar Sahakari Sakhar Karkhana Ltd. The A.O. also referred to the contract and also to the letter of confirmation submitted by the contractee regarding the differential amount having been spent on purchase of construction material which was purportedly handed over to the assessee and utilised in the project under review. The A.O. had taken into consideration that for the balance amount of Rs.1,02,000/- the debit notes were available and for the balance amount of Rs.70,82,000/- they could not be made available. He therefore rejected the contentions of the assessee and treated the said differential amount as the income to tax.

5. During the course of arguments Mr. Porwal, the learned counsel appearing for the assessee, on instructions had submitted that subsequently the contractee had furnished the debit notes and along with the affidavit, the list of debit notes amounting to Rs.1,45,60,127/- has been annexed thereto. It is further submitted that the assessee had received material worth Rs.1,45,60,127/- during the assessment year 1995-96 (financial year 1994-95) and Rs.1,03,61,602/- during the assessment year 1996-97 thus making the total material received of Rs.2,49,21,729/-. It is further stated that during the financial year 1994-95 and 1995-97 the total material consumed was of the value of Rs.1,79,25,956/- and this was all purchased and supplied by the contractee. Whereas the balance material worth Rs.71,95,772/- was lying with the contractor/assessee and it was the property of the contractee. Based on this additional information that is made available to him and placed before us along with the affidavit, Mr. Porwal submitted that the deficiency which was noticed by the assessing officer has been made up and therefore the order passed by the assessment officer cannot be sustained and, on the other hand, the view taken by both the lower appellate authorities requires to be confirmed.

6. We are of the considered opinion that the debit notes which are placed before us for the first time cannot be subjected to verification in this Tax Appeal and the said verification is required to be undertaken by the Assessing Officer. The relevance of all these debit notes will have to be examined by the Assessing Officer on the basis of all the material/record that will have to be furnished before him by the assessee.

7. In the case of Brij Bhushan Lal (supra) the contractor was a Military Engineering Services (M.E.S.) (contractor) and as such he was carrying on business of executing contracts and works on behalf of the Government. For the execution of the works undertaken by the contractor, certain materials such as cement, coal, items of steel etc. were supplied at the fixed rates specified in Schedule B to the contract by the Government for being used in the works. During the relevant assessment period the contractor had taken two contracts, one at Delhi and the other at Ambala. The contractor/assessee did not furnish any figures about the stores (material) received by it from the M.E.S. and when called upon to produce the relevant certificates in respect of such stores, the assessee failed to do so on the ground that the departments were not cooperating with it. Under Condition No.10 and 33 of the General Conditions it was stated that the contractor shall, at his own expense supply all stores and materials required for the contract, other than those listed in Schedule 'B' which are to be provided by the Government at the rates detailed therein and stores and materials requires for the works are to be deposited by the contract only in places to be indicated by the Engineer-in-charge . All the stores and materials brought to the site shall become and remain the property of the Government and shall not be removed off the site without the prior written approval of the Garrison Engineer. It was under these circumstances that the Supreme Court held in favour of the assessee. It further noted that having regard to the terms and conditions on which supply of stores/materials is made there was not even a theoretical possibility of any element of profit being involved in the turnover represented by the cost of such stores/material. Since no

element of profit involved in the turnover of costs of stores/materials supplied by M.E.S. to the assessee, the income or profits derived by the contractor from such contract will have to be determined on the basis of the value of the contract represented by the cash payment received by the assessee-firm from the M.E.S. Department exclusive of the cost of the material/stores received for being used, fixed or incorporated in the works undertaken by them.

8. In the case at hand the relevant tender term read as under:

' The materials listed in the above from 1 to 5 may be supplied to the contractor by the Employer with the coated basic rate separately. However, supply of the above materials, if not made available from the employer the same will be solely procured by the Contractor in execution of the works, in confirmation of the given basic price of materials listed in 1 to 5 only. '

9. If the contractee who was a cooperative sugar factory failed to supply the relevant material, the contractor was compelled to buy of his own so as to complete the project. In addition the contractee had made available debit notes for an amount of Rs.1,03,61,602/- and the debit notes for the amount of Rs.70,82,160/- were not made available. Having regard to the style of management and more particularly the fiscal management of the cooperative sugar factor in Maharashtra the assessing officer was right in not relying upon the certificate issued by the contractee regarding the differential amount. The ratio laid down in BrijBhushan Lal's case (supra) was therefore not applicable per se in the instant case and the assessee will

have to support the purchases made by the contractee on the basis of the debit notes or any other relevant documents.

10. Mr. Porwal also raised an additional point before us. He submitted that even if there is any differential amount, such an amount in its entirety cannot be treated to be the additional income and it may be considered as the turnover. This is also an issue which will have to be gone into by the assessing officer while examining the record/documents. We are sure the assessing officer would certainly understand the meaning between turnover and net income and record his findings accordingly.

11. We therefore allow the appeal partly and remand the assessment for the relevant period to the assessing officer for fresh investigation. The orders passed by the appellate authorities below are set aside. The Assessee will appear before the Assessing Officer on 11th January, 2005 and furnish the relevant documents/record. The Assessing Officer to proceed with the inquiry de novo and complete the same as expeditiously as possible and in any case within four weeks from 11th January, 2005.

B. H. MARLAPALLE, J.

N. A. BRITTO, J.

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